Filed 5/18/09 In re S.W. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.W., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. C.W., Defendant and Appellant.	E046797 (Super.Ct.No. INJ017207) OPINION

APPEAL from the Superior Court of Riverside County. Christopher J. Sheldon, Judge. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant C.W.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Leslie A. Barry, under appointment by the Court of Appeal, for Minor.

Appellant C.W. (mother) appeals from a juvenile court's order terminating parental rights to her daughter, S.W. (the child). Mother contends: 1) the juvenile court erred when it delegated the power to order visitation to the Riverside County Department of Public Social Services (the department), which, in turn, delegated authority to the child to determine visitation; and 2) the court erred when it failed to consider placement with the maternal uncle and apply the Welfare and Institutions Code[1] section 361.3 relative placement factors. We disagree and affirm the order.[2]

FACTUAL AND PROCEDURAL BACKGROUND

On July 26, 2005, the department filed a section 300 petition on behalf of the child, who was seven years old at the time. The petition alleged that the child came within section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). Specifically, the petition included the allegations that: 1) mother admittedly abused controlled substances and was recently arrested for driving under the influence; 2) mother willfully neglected the health and safety of the child, in that she regularly left her with the maternal grandmother and stepgrandfather, who is a registered sex offender; 3) mother lived a transient lifestyle; 4) mother has a history of engaging in domestic violence, as evidenced by her recent involvement with law enforcement for battery against her current

[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise noted.

[2] Counsel for the child filed a letter brief on February 20, 2009, asking this court to affirm the juvenile court's orders.

roommate; 5) the child's alleged father[3] failed to provide the child with adequate care and support.

On July 27, 2005, the court detained the child in foster care, ordered reunification services pending further hearing, and ordered supervised visitation at least four times per month.

Jurisdiction/Disposition

The social worker filed a jurisdiction/disposition report on August 15, 2005, and recommended that mother be provided with reunification services and that she have weekly supervised visits.

The jurisdictional hearing was held on August 23, 2005. The court found that the child came within section 300, subdivisions (b) and (g), and declared her a dependent of the court. The court maintained the child in foster care and ordered supervised visitation. The court also approved the case plan and ordered mother to participate. The case plan included the requirements that she participate in sexual abuse counseling, a domestic violence program, a parenting education program, substance abuse testing, and an outpatient substance abuse program. Visitation was to be arranged by the social worker once per month.

Six-Month Status Review

The social worker filed a six-month status review report on January 10, 2006, recommending that the court continue reunification services for another six months.

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[3] The child's alleged father is not a party to this appeal.

Mother started an inpatient substance abuse program on January 2, 2006, and said she was ready to be clean and sober. She had visited the child, but visits were inconsistent, which was very disappointing for the child. Mother did not make contact for a month or so and then called for a visit. On February 9, 2006, the court continued mother's services.

12-month Status Review

The social worker filed a status review report on June 23, 2006, and recommended that reunification services be terminated. Mother had left her inpatient treatment facility on March 5, 2006, and returned to living with the same roommate with whom she had previously had domestic violence disputes. Furthermore, despite the referrals and resources provided by the department, mother ignored her reunification services.

The social worker reported that visits had been arranged for mother and the child, but mother had visited only four times in the last six months. Mother did not call to tell the department she was not coming, and mother did not call to see how the child was doing after she had missed a visit.

The child was very happy in her foster home. She liked school and enjoyed reading. The social worker recommended legal guardianship with her foster family as the permanent plan. The social worker further reported that the maternal grandmother was the only relative who had been located by the department; however, she still lived with a registered sex offender.

At the 12-month review hearing on August 8, 2006, the court found that mother had failed to make substantive progress in her case plan and thus terminated reunification services. The court ordered legal guardianship as the permanent plan and set a section 366.26 hearing.

Section 366.26

The social worker filed a section 366.26 report on October 5, 2006, and recommended that the dependency be terminated and that the child's current foster parents, Mr. and Mrs. A, become her legal guardians. The child had been placed with them since July 2006, was very happy living with them, and wanted to remain with them in legal guardianship. The child said she remained hopeful that one day mother would want to see her again and share in her life.

A section 366.26 hearing was held on November 2, 2006. The court granted legal guardianship and terminated the dependency. Mother requested visitation, and the court ordered monthly telephone visitation.

Section 388 Petition

On July 27, 2007, the legal guardians filed a section 388 request to change court order. Mrs. A. had become seriously ill. The legal guardians requested that Mrs. A.'s sister, Ms. I., be appointed the successor legal guardian. The child was currently residing with Ms. I.

The department asked the court to continue the matter so it could investigate Ms. I.'s background. On September 6, 2007, the court granted the continuance.

On September 13, 2007, a review hearing on visitation was held and the court authorized supervised visits for mother.

On October 10, 2007, the social worker reported that Mrs. A. had passed away. Ms. I. told the social worker she could no longer care for the child due to personal hardships. She requested that the child be placed in foster care. The social worker filed an ex parte application asking the court to reinstate the dependency and locate foster care. The court granted the request and reinstated the dependency. The child was placed in a new foster home on October 11, 2007.

On October 31, 2007, the social worker filed an addendum report recommending that the section 388 petition be granted. The social worker attached a case plan to the report, which stated that, as to visitation, she would "design, and periodically change, a visitation schedule, which will be convenient for the child[] and caretakers . . . ."

A hearing on the section 388 motion was held on November 5, 2007, and the court granted the petition and terminated the legal guardianship. The court ordered a plan of a permanent planned living arrangement (PPLA). The court also ordered "[v]isitation for mother at DPSS discretion."

Postpermanent Plan Review

The social worker filed a status review report on March 11, 2008. A concurrent planning review was completed on November 21, 2007, when it was determined that the plan for the child was adoption. The child was placed with a prospective adoptive family on January 8, 2008, and was doing well with them. She had confided in her caregiver

that she did not want to return to mother's care but wanted her current caregivers to adopt her. The child was nine years old at the time.

The social worker further reported there had been no visits between mother and the child during this reporting period, partly because the child did not want to have visits, and partly because mother was in prison. Mother had not had any contact with the child in about one year. On January 17, 2008, the social worker received a letter from mother requesting a visit with the child. The social worker opined that visits should occur only with the child's consent and after mother was released from custody. Mother was scheduled to be released on June 3, 2008. The social worker believed it was not in the child's best interests to have visits with a person she had not seen in over a year, since it could jeopardize the child's sense of stability.

The child's CASA (court appointed special advocate) worker also spent time with the child. The child told her she wanted to see her mother but did not want to live with her. The CASA worker was concerned because the child could go from "happy to sad in an instant." She believed the child needed counseling to address her many emotional issues. The CASA worker did not support visits with mother until mother was released from custody, and then would support visits only if the child so desired. Since the child had not seen mother in a year, the CASA worker believed it would be "quite a traumatic experience." The CASA worker encouraged the child to communicate with mother through letters.

On May 7, 2008, the social worker filed an addendum report and reported that mother gave birth to another girl on April 28, 2008. Mother requested the baby to be placed with the maternal grandmother, but the baby was placed in protective custody. In addition, the social worker reported that the child had repeatedly expressed her desire to remain in her current placement and be adopted by the caretakers. The child was fearful of returning to mother's care and was hesitant about having visits with mother.

The court held a continued review hearing on May 21, 2008. The department submitted on the report filed on March 11 and the addendum report filed on May 7, 2008, and recommended the permanent plan of adoption. The court adopted the findings and orders contained in the review report, which stated that supervised visits with mother "will only occur with the child's consent and after the mother has been released from prison." The court ordered the permanent plan for the child to be adoption. The court set a section 366.26 hearing.

Section 366.26

The social worker filed a section 366.26 report on August 29, 2008, recommending that parental rights be terminated. The child was doing well in her current home and in school. She continued to make it clear that she wished to be adopted by her current caregivers. The caregivers had the child's best interests in mind, were always advocating for her needs, and were meeting her needs. They loved her very much and wanted to provide her with a loving and stable home.

The social worker additionally reported that, during this reporting period, there were no visits between mother and the child. Mother was released from custody on June 3, 2008, but as of the time of the report had not attempted to contact the department. The social worker opined that future visitation would not be in the child's best interests, given mother's history of emotional instability, substance abuse, and inability to maintain a stable placement. Moreover, the child did not wish to have any contact with mother.

The social worker further reported that a maternal uncle, A.W., contacted the department on May 22, 2008, about placement of the child with him and possible adoption. He mentioned that he was a Marine who had just returned from deployment. He said he had not had contact with the child since December 20, 2006, when they had a supervised visit at a park. The uncle had not had any contact with mother for the past three years. The social worker submitted a relative assessment referral, and the uncle's home was assessed and certified on June 25, 2008. In response to the uncle's request, the child said she did not wish to have any contact with her biological family aside from the sibling visits with her baby sister. On July 7, 2008, the uncle called the social worker and wanted to know if the child could be placed with him. The social worker said it was up to the department, but at that moment, the department was going to have the child continue in her current home because since the child wanted to be adopted by that family. The uncle said he understood.

The child requested a visit with mother because she wanted to ask her questions. A supervised visit took place on September 8, 2008. The visit created "some confusion

for the child," as it resurfaced feelings, and the child expressed a desire to live with mother.

In an addendum report, the social worker reported that she met with the child on September 22, 2008, to discuss whether or not she still wanted to be adopted. The child said that after the visit with mother, she was confused because she still loved her mother. However, the next day, the child decided she still wanted to be adopted by the prospective adoptive parents.

The section 366.26 hearing was held on October 1, 2008. Counsel for the child represented that the child wanted to go forward with the adoption. Mother objected to the adoption, based on the understanding that the prospective adoptive parents were not going to permit future contact between her and the child. Mother's counsel argued that it was wrong for the court and the department to allow a 10-year-old to "make such a permanent lifetime decision." Mother then requested that the court proceed with legal guardianship. The court terminated parental rights and ordered adoption to remain as the permanent plan.

ANALYSIS

I. Mother Forfeited Her Claim and Failed to File a Timely Appeal

Mother contends that, after Mrs. A. passed away and the court reinstated the dependency, the court improperly delegated to the department the authority to grant visitation, and the department, in turn, conditioned visitation on whether or not the child

wished to visit with mother. Mother asserts that she was entitled to regular visitation absent a finding that visitation was detrimental.

A. *Mother Has Forfeited the Issue*

As noted by the department, mother never raised the issue of the improper delegation of authority in the juvenile court or requested the court to modify the visitation order. Thus, mother has forfeited the issue on appeal. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.)

B. *Mother Failed to Timely Appeal the Visitation Orders*

In addition to failing to object in the juvenile court, mother failed to timely appeal the visitation orders she now challenges. A notice of appeal must be filed within 60 days after the making of the order being appealed. (Cal. Rules of Court, rule 8.400 (d).) "[A] parent may not attack the validity of a prior appealable order for which the statutory time for filing an appeal has passed. [Citation.] Such a limitation is necessary to promote finality and expedition of decisions concerning children and their interests in securing stable homes. [Citation.]" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259.)

The first visitation order mother complains about was made on November 5, 2007. The minutes reflect that the court ordered "[v]isitation for mother at DPSS discretion." The second order was made on May 21, 2008, when the court adopted the order contained in the social worker's review report, which stated that supervised visits with mother "will only occur with the child's consent and after the mother has been released

from prison." Mother did not file her notice of appeal until October 1, 2008—long after both orders were made. She attempts to save her appeal by asserting that the department denied her and the maternal uncle visits in September 2008, which fell within the 60-day period. However**,** the appeal is attacking the validity of the court's actual visitation orders, not the department's denial of visitation in September.

II. The Relative Placement Preference Did Not Apply

Mother asserts that a change in placement was required after Ms. I. said she could no longer care for the child. Mother contends that the social worker was obligated to inquire of the parents and conduct an independent investigation to determine whether any relatives were available for placement. She claims that the maternal uncle was available for placement, and that the court erred in failing to apply the section 361.3 relative placement preference factors to him. We conclude that the relative placement preference did not apply here, and that any error was harmless.

A. *Background*

The maternal uncle, A.W., contacted the department on May 22, 2008, about placement of the child with him and possible adoption. He was a Marine who had just returned from deployment. He said he had not had contact with the child since December 20, 2006. The uncle had not had any contact with mother for the past three years. The social worker submitted a relative assessment referral, and the uncle's home was assessed and certified on June 25, 2008. In response to the uncle's request, the child said she did not wish to have any contact with her biological family. The social worker

told the uncle it was up to the department to decide if the child could be placed with him, but at that moment, the child was going to continue in her current home, because she wanted to be adopted by that family.

B. *No New Placement Was Needed*

Section 361.3 applies "[i]n any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361 . . . ." (§ 361.3, subd. (a).) At that time, "preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative." (§ 361.3, subd. (a).) The relative preference for placement is again at issue when a new placement is necessary. Section 361.3, subdivision (d) provides, in relevant part: "Subsequent to the hearing conducted pursuant to Section 358 [the dispositional hearing], whenever a new placement of the child must be made, consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable and who will fulfill the child's reunification or permanent plan requirements." "The plain language of subdivision (d) states that when a 'new placement' is required the procedures 'described in this section' must be followed in the same way as when there is an initial placement . . . ." (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 794.) "[T]he preference afforded by section 361.3 applies to placements made before the juvenile court has terminated reunification services." (*In re Sarah S.* (1996) 43 Cal.App.4th 274, 285 (*Sarah S.*).)

Mother correctly asserts that a new placement was needed at the time Ms. I. said she could no longer care for the child. Mother claims that "[h]ad the social worker

properly conducted an independent investigation as to whether or not there were relatives available for placement, she would have discovered an appropriate relative placement . . . ." However, assuming mother is asserting that the maternal uncle was available for placement at that time, the record indicates otherwise. Ms. I. requested that the child be placed in foster care by October 9, 2007. The record shows that the uncle contacted the department on May 22, 2008, after "[h]e [had] *just* arrived from being deployed." (Italics added.) Thus, it seems highly unlikely that he was available for placement on October 9, 2007.

Moreover, by the time the uncle contacted the department to request placement, no new placement was needed. The relative placement preference applies when a child needs a temporary placement, "not when reunification efforts have failed and a permanent plan for adoption has been approved . . . ." (*Sarah S., supra*, 43 Cal.App.4th at p. 284.) The court had already ordered the permanent plan to be adoption. As of January 8, 2008, the child was in a stable placement with the prospective adoptive parents. The prospective adoptive parents were bonded with the child and were committed to adopting her and providing her with a loving and stable home. The child referred to them as "mom" and "dad" and wanted to be adopted by them. Although the social worker had the uncle's home assessed upon his request, there was no need to move the child from the prospective adoptive parents' home.

Mother asserts that it is not clear from the record that the uncle did not make contact with the department until May 2008. She then claims that, absent the information

of how the uncle learned of the child's placement or when he first contacted the department, we cannot correctly conclude that the relative placement preference did not apply. We disagree. The record unequivocally shows that the uncle contacted the department on May 22, 2008, and made his request for placement at that time. There was no mention of him in the record prior to that. Moreover, it is unlikely that he contacted the department regarding placement before that, since he had just returned from deployment.

In any case**,** any error in the court's failure to apply the relative preference factors was harmless. Section 361.3, subdivision (d) provides: "In addition to the factors described in subdivision (a), the county social worker shall consider whether the relative has established and maintained a relationship with the child." The record does not demonstrate that the uncle had established or maintained a relationship with the child. At the time he requested placement, the child had not seen him in approximately one and a half years. Furthermore, other factors the court would have considered include the best interests of the child, and the wishes of the parent, the relative, and child. (§ 361.3, subd. (a).) The record reflects that, in response to the uncle's request, the child said she did not want to have contact with her biological family, that she did not have a relationship with the uncle, and that she wanted to be adopted by her current caregivers. It was in the child's best interests not to uproot her from her stable placement with a family that loved her and was committed to adopting her.

"The relative placement preference . . . is not a relative placement *guarantee* [citation], and the record contains ample evidence that the preference was overridden in this case." (*In re Joseph T.*, *supra*, 163 Cal.App.4th at p. 798.) Under the circumstances of this case, the failure to apply the relative preference placement factors to the uncle's request was harmless error.

DISPOSITION

The order is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.